No. 10-939

Supreme Court, U.S.
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In The
Supreme Court of the United States

BARRY E. MUKAMAL, AS LIQUIDATING TRUSTEE AND DIRECTOR AND OFFICER TRUSTEE OF THE LIQUIDATING TRUST AND THE DIRECTORS AND OFFICERS TRUST OF FAR & WIDE CORPORATION; FAR & WIDE TRAVEL CORPORATION; ADVENTURE CENTER, INC.; AFRICAN TRAVEL, INC.; FAR & WIDE INTERNATIONAL, INC ; AND TRAVEL MEDIA SERVICES CORP.,

Petitioner,

v.

PHIL BAKES; ANDREW C. MCKEY; CRAIG TOLL; GEORGE GREMSE; WELLSPRING CAPITAL FUNDING LLC; CARL M. STANTON; GREG S FELDMAN; DAVID C. MARIANO; AND JASON B. FORTIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents are incorrect regarding all three points they raise in opposition to the petition. The decision below does not turn on state law. It is based on the Eleventh Circuit's holding that this Court has adopted a "stricter" pleading standard than the standard articulated in *Conley v. Gibson*, 355 U.S. 41 (1957), and required by Federal Rule of Civil Procedure 8(a). The Eleventh Circuit's decision is in conflict with many decisions of other courts of appeals. The plaintiff/petitioner did raise the issue that he now asks the Court to review.

STATEMENT OF THE CASE

In describing the allegations of the amended complaint, the respondents, like the Eleventh Circuit, disregard plain and concise factual allegations that the respondents inflicted harm on the corporation they served as directors and officers through acts of self-dealing in disregard of independent consultants and generally accepted accounting principles and Financial Accounting Standard Board regulations. (Petition at 4-5).

Only this disregard allows them to characterize the amended complaint as alleging only that the respondents "should have stopped exercising their fiduciary duties for the benefit of Far & Wide's shareholders (a group of which several of them were members), and should instead have directed their energies

toward protecting Far & Wide's creditors." (Opposition at 3). They cite for this misdescription page 65 of the appendix. That page contains the actual allegations of the amended complaint that the respondents' actions "were not in good faith," that they were "in conscious disregard" of their fiduciary duties to maximize shareholder value, and that they "were motivated by advancing" their own interests "at the expense of and to the detriment to the value of Far & Wide's assets." (App. 65).

Counts VIII through XII did *not* contend, as the respondents assert, that the respondents breached duties that the respondents owed to creditors. They clearly and specifically alleged that the respondents' acts of self-dealing breached their duties to the corporation. (App. 145-59).

For their mischaracterization of the amended complaint, the respondents also rely heavily on the district court's misdescription of the pleading, rather than the pleading itself (Opposition at 3) ("the district court explained . . . the district court emphasized. . . . "). The breach of fiduciary duty and loyalty allegations of counts VIII through XII were not "premised . . . 'on a divergence of interests as between the Defendants and Far & Wide's creditors'" (Opposition at 3) (quoting the district court), they were explicitly based on the divergence of interests as between the respondents and *the corporation* and the actions of the respondents in conscious disregard of *the corporation's* interests. (App. 145-59). Paragraph 365, for example, of Count VII, alleged the respondents'

actions were for their own benefit "at the expense of and to the detriment to the interests of *the Far & Wide corporate entity*." (App. 143) (emphasis added). Paragraph 378 of Count VIII alleged that the respondents' actions were for their own benefit "at the expense of and to the detriment of the *Far & Wide corporate entity and its assets*." (App. 146) (emphasis added). Paragraph 394 of Count IX alleged the respondents breached "their fiduciary duty of loyalty to *the Far & Wide corporate entity*." (App. 150) (emphasis added). Counts X through XII similarly focused on actions of the respondents in derogation of the corporation's interests, not the corporation's creditors' interests. (App. 152, 156, 159). These general allegations within the counts were backed with specific factual allegations showing precisely how the respondents had used corporate assets for their own interests and in derogation of corporate interests. (App. 90-117). Fairly read under the pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957), as explicated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009), counts VIII through XII can be read in no other way than as providing clear and concise notice to the respondents that the plaintiff intended to prove that the respondents engaged in classic acts constituting breaches of fiduciary duty to the corporation.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Turns On a Critical Interpretation of a Federal Rule of Civil Procedure

The respondents' initial point – that the decision below "turns on" Delaware law (Opposition at 5) – is of no moment here. While the parties did not agree below regarding how Delaware law or Florida choice of law rules should be interpreted,[1] the plaintiff is not seeking review of these state law rulings. The plaintiff accepts those rulings and shows in its petition that the Eleventh Circuit was able to affirm dismissal of the amended complaint only by holding that this Court adopted a "stricter" pleading standard in *Twombly* and *Iqbal* than that adopted in *Conley*. This aspect of the Eleventh Circuit opinion allowed it to ignore the clear and concise factual allegations that the respondents breached their fiduciary duties to Far & Wide as those duties are defined by the Eleventh Circuit's interpretation of Delaware law.

Respondents contend that this Court "would need to evaluate in detail" Delaware law "in order to decide whether pleading standards were properly applied." (Opposition at 6). This is incorrect. The plaintiff expressly accepted the Eleventh Circuit's interpretation of Delaware law and has asserted only that the

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[1] The resolution of this dispute resulted in affirmance of dismissal of counts I through VII of the amended complaint, counts that are not at issue in this Court

allegations of the complaint state a claim under that interpretation of Delaware law. The essential principles of Delaware law at issue are set forth clearly in the Eleventh Circuit's opinion and they are principles that are very familiar to the Court. For example, the opinion recites that "Under Delaware law, '[t]he essence of the duty of loyalty is that "corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests."'" (App. 20). It further explains that "'The fiduciary duty of care requires that directors of a Delaware corporation use that amount of care which ordinarily careful and prudent men would use in similar circumstances, and consider all material information reasonably available in making business decisions.'" (App. 25) (quoting *In re Walt Disney Co.*, 907 A.2d 693, 749 (Del. Ch. 2005)). Obviously, these are elementary principles that require no elaborate evaluation and that makes this case ideal to address whether the Court has established a "stricter" pleading standard. It can be easily seen from a comparison of the allegations of the amended complaint to the Eleventh Circuit's interpretation of Delaware law that the plaintiff's claim would have survived the pleading standard of *Conley* and was dismissed solely because the Eleventh Circuit believed that a stricter pleading standard is now in place that permitted it to ignore many of the plausible factual allegations that were made.

Respondents argue that the "prominence of state substantive law in this case sharply distinguishes it

from *Twombly* and *Ashcroft v. Iqbal*." (Opposition at 6). Whether the underlying claim is state or federal law makes no difference. Federal claims have no greater dignity here than state claims and given that the plaintiff makes no attack on the Eleventh Circuit's interpretation of state law, examination of the federal pleading standard poses no greater challenge than in a case brought under federal law. Indeed, examination of the federal pleading standard in a case such as this will be far easier because the case involves no complex statutory problems like those present in *Twombly* and *Iqbal*. Instead, it is rooted in well-established common law principles.

Nothing in the petition asks the Court to disturb its longstanding disposition against displacing a considered judgment on an issue whose resolution is heavily contingent upon an analysis of state law, as the respondents contend (Opposition at 7-8).

The respondents' argument that "petitioner does not even argue . . . that the court of appeals would have reached a different outcome even if it had applied the abrogated *Conley* standard" reflects that the respondents have applied just as jaundiced an eye to the petition as the Eleventh Circuit applied to the amended complaint through its "stricter" pleading standard. The petition could not have been clearer. It stated: "Reversal of the decision below and reinstatement of the amended complaint's claims on behalf of Far & Wide against the defendants should be ordered through application of the *Conley* pleading

standard that was reaffirmed in both *Twombly* and *Iqbal*." (Petition 20).

II. The Courts of Appeals are Deeply Divided on Whether the *Twombly/Iqbal* Standard is Stricter than the *Conley* Standard

The respondents' second point is also wrong. The courts of appeals and the commentators repeatedly have acknowledged the division that exists not only between the courts of appeals but also within the courts of appeals.

In an article published last year, the authors surveyed many cases and found "initial signs point to a potential conflict between the circuits that may force the Court to revisit the pleading standards for the third time in as many years." Allegra J. Lawrence-Hardy & Nathan D. Chapman, *Clarity or Chaos? Ashcroft v. Iqbal One Year Later*, 4 Bloomberg Finance L.P. No. 39 (2010).

In another article that "examines where things stand with respect to pleading 18 months after *Iqbal*," a different commentator concluded that this Court's decisions in *Twombly* and *Iqbal* "injected uncertainty into an area of the law that has been settled for decades." Claire Prestel, *Pleading Where Things Stand After* Iqbal, 79 BNA Insights 1871 (Jan. 11, 2011). She found that "courts began to cite *Twombly* and *Iqbal* immediately and on a massive scale: within six months, *Iqbal* had been cited in more than 3,520 federal cases; the number now stands at more than

15,000." *Id.* at 1872. "[O]ne recurring theme in the case law is that from the perspective of the federal district courts and the courts of appeals, the Supreme Court's decisions left key questions unanswered." *Id.*

In *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010), for example, Judge Diane P. Wood wrote that federal courts are "still struggling" with the standard, and that in dissent in *Swanson*, Judge Richard Posner described *Iqbal* as "opaque." *Id.* at 403. The respondents would have the Court believe that the pleading standard is now well settled but they ignore the fact that in *Starr v. Sony BMG*, 592 F.3d 314, 328 (2d Cir. 2010), Judge Jon O. Newman described an aspect of *Twombly* as "perplexing."

Iqbal now has been the subject of more than 600 law review articles, some of which defend the decision and others have been "sharply critical, faulting the court for importing summary judgment concepts into the pleading stage, and for acting outside the rules' amendment process." Prestel, *supra* at 1872. Some of the literature has questioned empirical assumptions made by the Court in *Twombly* and *Iqbal*. Arthur Miller, *Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1 (2011) (pointing to Federal Judicial Center survey suggesting discovery costs had no effect on likelihood of settlement); Alex Reinert, *The Costs of Heightened Pleading*, 86 Ind. L.J. ___ (forthcoming 2011) (data shows that thinly pleaded cases have done at least as well as complaints in general).

That a division between circuits is now full blown is particularly well illustrated by the instant case which holds that *Twombly* and *Iqbal* adopted a "stricter" pleading standard than that imposed in *Conley* and Third Circuit cases such as *West Penn Allegheny Health System, Inc. v. UPMC,* 627 F.3d 85 (3d Cir. 2010), which specifically rejected a district court's conclusion that judges now must subject pleadings to "heightened scrutiny."

The respondents contend that then-Judge Sotomayor's opinion for the Second Circuit in *Boykin v. KeyCorp,* 521 F.3d 202 (2d Cir. 2008), cannot be read as rejecting the heightened pleading standard adopted by the Eleventh Circuit in the instant case (Opposition at 9), yet the decision itself states "to require more than Rule 8(a)'s 'simplified notice pleading standard' would unjustifiedly impose a heightened pleading requirement on the plaintiff." *Id.* at 212. The respondents similarly quibble about whether other appellate decisions can be read as adhering to the mandate of *Conley* because they contend that *Conley* has been overruled and now all circuits agree with this point. (Opposition at 10) ("Petitioner has attempted to manufacture the appearance of a circuit conflict"). While this plainly is not the case, if it were the case it would speak all the more loudly in favor of granting certiorari to make clear that *Conley* has not been overruled, that the standard imposed by Rule 8(a) remains firmly in place, and that courts ought not be dismissing pleadings such as the amended complaint in this case.

Respondents also argue against issuance of the writ because the Eleventh Circuit elected not to publish its decision in this case. It is apparent that it did so, however, only because its decision follows the erroneous path that it started down in cases such as *American Dental Ass'n v. CIGNA Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010). That the Eleventh Circuit regards its adoption of a stricter pleading standard as so well established that it need not publish any further decisions on this point is yet another reason for the Court to grant the writ. Of course, as noted in the petition and as ignored by the respondents, the Eleventh Circuit's adoption of a stricter standard was not in fact well established. It conflicted with its own prior decision in *Randall v. Scott*, 610 F.3d 701, 709 (11th Cir. 2010), holding that *Twombly* and *Iqbal* "did not apply a heightened pleading standard."

III. Petitioner Raised the Issue it Now Seeks to Review

The respondents' third point – that this issue had not been raised – is also incorrect. Plaintiff obviously argued in the district court and in the Eleventh Circuit that under the pleading standard of *Twombly* that both the complaint and amended complaint stated a claim upon which relief can be granted. Specifically, in his initial brief in the Eleventh Circuit, plaintiff argued as his initial point on appeal that "the District Court Erred in Dismissing the Direct Debtor Disloyalty Claims in the Amended

Complaint." (Brief at 17). He cited the Eleventh Circuit's decision in *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1303 (11th Cir. 2008), as providing the appropriate standard of review. That case cited *Twombly* as providing the standard applicable for judging whether allegations of a complaint are sufficient and it made no intimation that *Twombly* should be interpreted as imposing a "stricter" standard than that described in *Conley*. *Id.* at 1303. *Mills* held that a district court must "'accept[ ] the allegations in the complaint as true and construe them in the light most favorable to the plaintiff.'" *Id.* (citation omitted). It correctly quoted *Twombly* as holding that a complaint "'does not need detailed factual allegations, a plaintiff's obligation to provide the ground of his entitled to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 127 S. Ct. at 1964-65. Plaintiff argued for application of the *Conley* standard as it had been explained in *Twombly* and expected the Eleventh Circuit to apply that standard, not a stricter standard under which the court would ignore clear and concise factual allegations.

In the district court, plaintiff relied on the Eleventh Circuit's decision in *Watts v. Florida International Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007), for the proposition that a "'pleading must create "plausible grounds to infer" entitled to relief,'" and directed the Court's attention to *Twombly*. (Docket Entry 54 at 5) (quoting *Watts* and *Twombly*). Nothing in the

Eleventh Circuit's *Watts* decision suggested that *Twombly* later would be interpreted as a "stricter" standard than *Conley* or as a standard allowing federal courts to ignore factual allegations such as those in the complaint and the amended complaint in this case. *Watts* simply quoted the language of *Twombly* that discussed how the *Conley* standard is to be applied. *Id.* at 1295.

Plaintiff had no need to brief whether *Twombly* was a stricter standard than *Conley* because the respondents never claimed that it was and the Eleventh Circuit previously had held that in *Randall* that it is not. (Petition at 22). The Eleventh Circuit simply announced its conclusion that *Twombly* is stricter than *Conley* out of the blue and this then provided its justification for ignoring specific factual pleadings that the respondents inflicted direct harm on the corporate entity through their actions.

Having advocated for the proper pleading standard in the district court and in its appeal, plaintiff had no obligation to raise again this issue by petition for rehearing or rehearing en banc or, indeed, to file any petition for rehearing at all. The rule that issues may not be raised for the first time in the Supreme Court applies where fuller development of the record or exploration of the issues would help ensure that a quality decision is reached, not whereas here, a federal appellate court simply ratchets up a pleading standard beyond what either the federal rules or precedents of the Supreme Court require and then surprisingly uses that higher standard to blind itself

to specific and plausible pleadings. Plaintiff alleged that Bakes and his compatriots lined their pockets with millions of corporate funds without justification. Under *Conley*, that easily would have been sufficient to state a claim. Only by treating *Conley* as overruled and *Twombly* and *Iqbal* as adopting a "stricter" standard could the Eleventh Circuit have ruled otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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